

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff

v.

MARKMAN BIOLOGICS CORP., et al.,

Defendants

Case No.: 2:23-cv-00288-APG-DJA

Order Granting in Part and Denying in Part Motion to Strike

[ECF No. 12]

9 The Securities and Exchange Commission (the “SEC” or the “Commission”) brings this
10 enforcement action against Markman Biologics Corp., Alan Shinderman, and relief defendant
11 Aspen Asset Management Services, LLC (“AAM”).¹ Markman Biologics holds patents relating
12 to micro-surfacing skin graft technology. Alan Shinderman is the CEO of Markman Biologics
13 and sole owner and operator of AAM. AAM entered into an agreement with Markman Biologics
14 to provide various business services. This enforcement action arises from the defendants’
15 various securities offerings to raise money for Markman Biologics’ operations.

16 The SEC brings claims against the defendants for fraud in the offer, purchase, or sale of
17 securities and offering and selling unregistered securities through interstate commerce. The SEC
18 seeks disgorgement of AAM's unjust enrichment. In their answer, the defendants assert 30 items
19 they characterize as affirmative defenses. The SEC moves to strike, or construe as denials,
20 several of the affirmative defenses on various grounds.² I grant the SEC's motion in part. As the

²² ¹ Markman Biologics entered into a final judgment with the SEC and is no longer a party to this suit. ECF Nos. 38-39.

²³ ² In its reply, the SEC withdraws its motion to strike affirmative defenses 2, 5, 6, 13, 14, and 15. ECF No. 17 at 8. Additionally, in their response, the defendants withdraw affirmative defense 4. ECF No. 15 at 16.

1 parties are familiar with the facts of this case, I repeat them here only as necessary for my
 2 analysis.

3 **I. Legal Standard**

4 “The court may strike from a pleading an insufficient defense or any redundant,
 5 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “The function of a 12(f)
 6 motion to strike is to avoid the expenditure of time and money that must arise from litigating
 7 spurious issues by dispensing with those issues prior to trial.” *Fantasy, Inc. v. Fogerty*, 984 F.2d
 8 1524, 1527 (9th Cir. 1993) (simplified), *overruled on other grounds*, 510 U.S. 517 (1994). It is
 9 within my discretion whether to grant a 12(f) motion to strike. *Id.*

10 “An affirmative defense is one that precludes liability even if all of the elements of the
 11 plaintiff’s claim are proven.” *Gomez v. J. Jacobo Farm Lab. Contractor, Inc.*, 188 F. Supp. 3d
 12 986, 991 (E.D. Cal. 2016); *see also Safeway Transit LLC v. Disc. Party Bus, Inc.*, 954 F.3d 1171,
 13 1182 (8th Cir. 2020) (“An ‘affirmative defense’ is ‘[a] defendant’s assertion of facts and
 14 arguments that, if true, will *defeat* the plaintiff’s . . . claim, even if all the allegations in the
 15 complaint are true.’” (quoting *Defense*, *Black’s Law Dictionary* (11th ed. 2019))). But, “[a]
 16 defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative
 17 defense.” *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). “An affirmative
 18 defense may be insufficient either as a matter of law or as a matter of pleading.” *Gomez*, 188 F.
 19 Supp. 3d at 991 (simplified). An affirmative defense is insufficient as a matter of law “where
 20 there are no questions of fact, that any questions of law are clear and not in dispute, and . . .
 21 under no set of circumstances could the defense succeed.” *Ramirez v. Ghilotti Bros. Inc.*, 941 F.
 22 Supp. 2d 1197, 1204 (N.D. Cal. 2013) (quotation omitted). As a matter of pleading, an
 23 affirmative defense is insufficient where it does not give the opposing party fair notice of the

1 affirmative defense. *Kohler v. Flava Enters., Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015). “[T]he
 2 ‘fair notice’ required by the pleading standards only requires describing the defense in general
 3 terms.” *Id.* (quotation omitted).³

4 II. Analysis

5 1. Affirmative Defenses Nos. 7, 16, 18, 24, 25, 26, 27, 28, and 29

6 The defendants did not respond to the SEC’s motion to strike affirmative defenses 7, 16,
 7 18, 24, 25, 26, 27, 28, and 29. Thus, under Local Rule 7-2(d), I grant the SEC’s motion to strike
 8 these affirmative defenses. I dismiss these affirmative defenses without prejudice and with leave
 9 to amend because I do not “think such leave would be futile.” *Kendall v. Visa U.S.A., Inc.*, 518
 10 F.3d 1042, 1051 (9th Cir. 2008).

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14 ³ The SEC argues that the *Twombly/Iqbal* plausibility standard applies to affirmative defense
 15 pleading instead of the “fair notice” standard. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007);
 16 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). “Post-*Kohler*, there is a split of authority within the
 17 Ninth Circuit and within this District as to whether affirmative defenses must be supported by
 18 sufficient factual allegations to meet the *Twombly/Iqbal* pleading standards.” *Cervantes v. Las
 19 Vegas Metro. Police Dep’t Det. Serv. Div.*, 2:17-cv-00562-MMD-DJA, 2021 WL 9217679 at *5
 20 n.5 (D. Nev. Feb. 23, 2021) (quotation omitted). Some district courts in our circuit apply the
 21 *Twombly/Iqbal* plausibility standard to the pleading of affirmative defenses. *See, e.g. Goobich v.
 22 Excelligence Learning Corp.*, 5:19-cv-06771-EJD, 2020 WL 1503685 at *2 (N.D. Cal. March,
 23 30, 2020) (collecting cases in the Northern District of California that apply the *Twombly/Iqbal*
 24 plausibility standard following *Kohler*). However, I am persuaded that “requiring that an
 25 affirmative defense . . . be described in ‘general terms’ does not invoke—and in fact appears
 26 inconsistent with—the heightened standard of substantive plausibility identified by *Twombly* and
 27 *IqbalGomez*, 188 F. Supp. 3d at 992 (simplified); *see also Sims v. Peak Legal Advocs.*, No.
 28 SACV 18-1199 JVS (KESx), 2018 WL 8731538, at *1 (C.D. Cal. Nov. 16, 2018) (“Although
 29 other courts have held defendants to the *Iqbal* and *Twombly* standard of plausibility, in the Ninth
 30 Circuit, a ‘fair notice’ standard applies to pleading affirmative defenses.”); *Heyman v. Nev. ex
 31 rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, No. 2:15-CV-01228-RFB-GWF, 2016 WL
 32 11662273, at *1 (D. Nev. July 22, 2016) (“This district has ruled that the *Iqbal* pleading standard
 33 does not apply to affirmative defenses . . . because Rule 8(c) does not require a ‘showing,’ as
 34 does Rule 8(a).” (quotation omitted)).

1 **2. Affirmative Defenses Nos. 12, 17, 21, 22, and 30**

2 The defendants did not respond to the SEC's motion to construe affirmative defenses 12,
3 17, 21, 22, and 30 as denials. Based on Local Rule 7-2(d), I grant the SEC's motion to construe
4 these affirmative defenses as denials.

5 **3. Affirmative Defense No. 1**

6 The first affirmative defense asserted is that Barry Markman is a necessary party in this
7 enforcement action because he directed the defendants to take the alleged unlawful actions and
8 knowingly participated in them. The SEC argues that the Commission is the sole architect of its
9 enforcement proceedings and that parties cannot use compulsory joinder rules to circumvent its
10 discretion. The plaintiffs respond that the SEC did not include Barry Markman in this action
11 because he is cooperating with the Commission. The SEC replies that Barry Markman is not an
12 indispensable party because his presence in the litigation does nothing to change the SEC's
13 allegations that the defendants violated federal securities law.

14 A decision not to institute enforcement proceedings is "committed to agency discretion"
15 and not judicially reviewable unless Congress says otherwise. *Heckler v. Chaney*, 470 U.S. 821,
16 832, 837 (1985). It is within the SEC's discretion to investigate and enforce the provisions of
17 federal securities law. *See* 15 U.S.C. §§ 78u(a), (d). Thus, it was in the SEC's discretion not to
18 bring an enforcement action against Barry Markman. Additionally, Barry Markman is not
19 indispensable to the SEC's investigation of the defendants' alleged violations of federal
20 securities laws and the enforcement of these laws against them because this action is about the
21 defendants' actions. I grant the SEC's motion to strike affirmative defense number 1.

22 **4. Affirmative Defense No. 3**

1 The defendants' third affirmative defense is that AAM was not unjustly enriched. The
2 SEC argues this is not an affirmative defense, it is a denial, because it denies SEC's allegation
3 that AAM was unjustly enriched by Shinderman and Markman Biologics' unlawful activity. The
4 defendants respond that because the SEC requests any relief I may determine is "just and
5 necessary," this defense may apply. ECF No. 15 at 12. Because the defendants' statement that
6 AAM was not unjustly enriched does not defeat liability "even if all the allegations in the
7 complaint are true," it is not an affirmative defense. *Safeway Transit*, 954 F.3d at 1182. I grant
8 the SEC's motion to construe affirmative defense number 3 as a denial.

9 **5. Affirmative Defense No. 8**

10 In their eighth affirmative defense, the defendants allege that some, or all, of the SEC's
11 claims "are barred by the doctrine of laches." ECF No. 10 at 14. The SEC argues that
12 traditionally the defense of laches cannot be brought against the United States, and that the
13 defendants fail to allege any facts supporting this defense. The defendants respond that the Ninth
14 Circuit allows the defense of laches against the federal government where there is a showing of
15 affirmative misconduct on the government's part. The SEC replies that the defendants have not
16 alleged any affirmative misconduct.

17 "It is well settled that the United States is not . . . subject to the defense of laches in
18 enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940). There may be
19 "some allowance for laches against the government" but it "requires a showing of affirmative
20 misconduct" on the government's part. *United States v. Ruby Co.*, 588 F.2d 697, 705 n.10 (9th
21 Cir. 1978). Here, the defendants allege no facts identifying how the doctrine of laches would
22 apply in this case, nor how the SEC engaged in affirmative misconduct, so they have not given
23 the SEC fair notice of this defense. I grant the SEC's motion to strike affirmative defense

1 number 8. However, because I cannot conclude that the defendants' latches defense lacks merit
 2 under any facts they may allege, I strike it without prejudice and with leave to amend.

3 **6. Affirmative Defense No. 9**

4 In their ninth affirmative defense, the defendants allege that the SEC's claims are "barred
 5 and/or reduced by the contributory negligence and/or other fault of those other than the
 6 Responding Defendants, including the Markmans." ECF No. 10 at 15. The SEC moves to strike
 7 this defense because it "brought this action under its statutory mandate to enforce the federal
 8 securities laws" and is not seeking "damages, but rather disgorgement . . . and a civil penalty."
 9 ECF No. 12 at 8. The SEC argues that the defense of contributory negligence thus does not
 10 apply and should be struck. The defendants respond that the SEC ends its complaint by asking
 11 me to "[g]rant such other and further relief as this Court may determine to be just and
 12 necessary." ECF No. 15 at 12 (quotation omitted). The defendants argue that this means that the
 13 SEC could later seek money damages, so I should not strike this defense. The SEC replies that it
 14 is not required to prove damages or loss causation in an enforcement proceeding, so an
 15 "affirmative defense claiming that a third party contributed to, or caused, damages is thus
 16 irrelevant here." ECF No. 17 at 5.

17 "The general rule is that contributory negligence is a defense only to actions grounded on
 18 negligence." *Curry v. Fred Olsen Line*, 367 F.2d 921, 928 (9th Cir. 1966). *See also Consol. Rail*
 19 *Corp. v. Gottshall*, 512 U.S. 532, 543-44 (1994) (listing contributory negligence as a "common-
 20 law defense[] to liability" for "common-law concepts of negligence and injury"). The SEC
 21 brings fraud-based claims in this enforcement action, not negligence claims. *See* 15 U.S.C. §§
 22 77q(a); 78j(b); 77e(a) and (c); 17 C.F.R. § 240.10 b-5. *See also S.E.C. v. Rana Rsch. Inc.*, 8 F.3d
 23 1358, 1359, 1363 n.4 (9th Cir. 1993) (stating that in an enforcement action for violations of 15

1 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5, the SEC was not required to prove injury). As the
2 SEC does not bring any negligence claims against the defendants, I grant the SEC's motion to
3 strike affirmative defense number 9 without prejudice and with leave to amend because, if the
4 complaint is amended to include a claim based on negligence, it is not clear that amendment
5 would be futile.

6 **7. Affirmative Defense 19**

7 In affirmative defense 19, the defendants allege that the SEC is not entitled to attorney's
8 fees or costs from AAM. Though the SEC asks me to strike this defense, it does not offer any
9 support for its request. I therefore deny the SEC's motion to strike affirmative defense 19. *See*
10 LR 7-2(d).

11 **8. Affirmative Defense No. 20**

12 In affirmative defense 20, the defendants allege that the SEC's claims against them are
13 barred or limited by the doctrine of unclean hands. The SEC argues that, under the traditional
14 rule, the doctrine of unclean hands cannot be invoked against a governmental agency enforcing a
15 congressional mandate in the public interest unless the agency engaged in outrageous or
16 unconstitutional activity that prejudiced the defendants on a constitutional level. The SEC
17 argues that the defendants have not alleged any outrageous or unconstitutional activity. The
18 defendants respond that they raise this defense because the SEC is basing this action on Barry
19 Markman's testimony, though Barry Markman pursued this action for his personal benefit as the
20 "mastermind of the alleged improper conduct," in an effort to take back the patents he transferred
21 to Markman Biologics. ECF No. 15 at 13-14.

22 The defendants gave the SEC fair notice of their unclean hands defense. The fair notice
23 standard for affirmative defenses "only requires describing the defense in general terms," which

1 the defendants have done. *Kohler*, 779 F.3d at 1019 (quotation omitted). See, e.g. *Springer v.*
 2 *Fair Isaac Corp.*, 14-cv-02238-TLN-AC, 2015 WL 7188234 (E.D. Cal. Nov. 16, 2015) (finding
 3 that a “vague and general” statement was enough to “put Plaintiff on notice of Defendant’s
 4 intentions to claim an affirmative defense under the doctrine of unclean hands.”). Thus, I deny
 5 the SEC’s motion to strike affirmative defense number 20.

6 **9. Affirmative Defense No. 23**

7 In affirmative defense 23, the defendants allege that the SEC’s claims against them are
 8 barred or limited by the doctrine of unjust enrichment. The SEC argues that because the
 9 Commission is not seeking forfeiture or damages, but instead is seeking a civil monetary penalty
 10 and disgorgement, this defense does not apply. The defendants respond that because the SEC
 11 ends its complaint by asking me to “[g]rant such other and further relief as this Court may
 12 determine to be just and necessary,” the SEC “has not ruled out the possibility of seeking or
 13 obtaining monetary damages.” ECF No. 15 at 12. The defendants reply that any disgorgement
 14 the SEC would receive from the defendants will be “returned to harmed investors or to the
 15 United States Treasury if distribution to harmed investors is infeasible.” ECF No. 17 at 5. Thus,
 16 the SEC contends that any disgorgement would not enrich the SEC. I grant the SEC’s motion to
 17 strike affirmative defense number 23 because the defendants have not pleaded how the SEC
 18 would be unjustly enriched as no monies will be retained by the SEC. I strike this defense
 19 without prejudice and with leave to amend as it is not clear that amendment will be futile if the
 20 SEC later amends its complaint to seek damages.

21 **10. Affirmative Defenses Nos. 10 and 11**

22 In their tenth affirmative defense, the defendants allege that the SEC lacks standing to
 23 assert its claims. The SEC asks me to strike this claim, arguing that they are authorized by

1 federal statute to bring enforcement actions to enforce federal securities law. In their eleventh
2 affirmative defense, the defendants allege that some or all of the SEC's claims are barred
3 because there is no provable injury to the SEC. The SEC also asks me to strike this defense,
4 arguing that the SEC does not need to prove injury to itself as their duty is to enforce federal
5 securities law. The defendants do not respond to the SEC's motions to strike either affirmative
6 defense. I therefore grant the SEC's motion to strike both of these affirmative defenses as
7 unopposed. LR 7-2(d).

I strike these affirmative defenses with prejudice because amendment would be futile.

Kendall, 518 F.3d at 1051. The SEC has standing because Congress authorized the Commission to bring enforcement actions for violations of the Securities Act and Securities and Exchange Act. See 15 U.S.C. §§ 77t(b); 78u(e). Additionally, the SEC does not need to prove injury to itself in enforcement actions. See *Berko v. Sec. & Exch. Comm'n*, 316 F.2d 137, 143 (2d Cir. 1963) (“The Commission’s duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury.”).

III. Conclusion

17 I THEREFORE ORDER that the plaintiff's motion to strike (**ECF No. 12**) is
18 **GRANTED in part.** Affirmative defenses 1, 7, 8, 9, 10, 11, 16, 18, 23, 24, 25, 26, 27, 28, 29
19 are dismissed. Affirmative defenses: 3, 12, 17, 21, 22, 30 are construed as denials. The
20 affirmative defenses that remain are 2, 5, 6, 13, 14, 15, 19 and 20.

21 I grant the defendants leave to file an amended answer by April 2, 2024.

22 DATED this 11th day of March, 2024.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE